Supreme Court, U.S.
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NO. 90-1884

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Prudential Insurance Company
of America,
Petitioner,

v.

Billy W. Brown,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY

I.

THE VITAL REASONS FOR GRANTING THIS PETITION STAND UNCHALLENGED

There are hundreds, if not thousands, of multi-employer trusts similar to the IGA Trust in operation across the country through which smaller employers are able to provide their workers with better health care benefits at lower cost than they would be able to provide through individual employer plans. Many of these trusts are sponsored by industry trade associations, and many are sponsored jointly by trade associations and unions through multi-employer collective bargaining. The rule established by the state appellate court below -- that none of these plans constitute ERISA-covered "employee welfare benefit plans" unless the individual employers

participate in the "day-to-day operation or administration" of the plan (App. A-12) -- is at once nonsensical from a practical standpoint and not authorized by the letter or spirit of ERISA.

This Court recently articulated the rationale for ERISA preemption, in words which are particularly apt here, as follows:

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. *FMC Corp.*, 498 U.S., at __, 111 S.Ct., at 408 (citing *Fort Halifax*, 482 U.S., at 10-11); *Shaw*, 463 U.S., at 105, and n.25, 103 S.Ct., at 2094, and n.25. Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a).

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Ingersoll-Rand Co. v. McClendon, __ U.S. __, 111 S.Ct. 478, 484 (1990) (emphasis added).

By engrafting on to ERISA a requirement that individual employers participate in day-to-day administration of multi-employer welfare benefit plans, the state appellate court below has put itself at odds with the decisions of two federal appellate courts.[1] Moreover, the issue posed is of obvious and critical importance to the proper administration of ERISA, because the rule established by the state appellate court would eliminate most multi-employer welfare benefit plans from the scope of ERISA's coverage.

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1. See *Kidder v. H & B Marine, Inc.*, 932 F.2d 347 (5th Cir. 1991); *Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236 (5th Cir. 1990); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir.), cert. denied, 492 U.S. 906 (1989).

Rather than addressing the substance of the important policy questions raised under ERISA by the lower court's decision, Respondent, in its Brief in Opposition, has advanced a series of erroneous hypertechnical arguments largely concerning ancillary matters.[2] As briefed in the points below, Respondent's technical arguments are without merit and should not divert this Court from considering the important

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2. For example, Respondent begins by asserting that Petitioner's Appendix fails to comply with Supreme Court Rule 14(k)(i) because it does not include the January 19, 1989 interlocutory ruling of the Texas trial court on ERISA preemption. Respondent has, however, clearly misinterpreted Rule 14(k)(i), which requires that the appendix contain: "The opinions, orders, findings of fact, and conclusions of law . . . delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed" (emphasis added). Petitioner seeks review of the Texas Fourteenth Court of Appeals' decision, not the trial court's decision. In any event, the January 19, 1989 "ruling" was only an interlocutory ruling that was merged into the trial court's final ruling on ERISA preemption. See Point III below.

substantive issue raised by this case concerning the scope of ERISA.

II.

THIS COURT PLAINLY HAS JURISDICTION UNDER 28 U.S.C. § 1257

Respondent argues that this Court does not have jurisdiction under 28 U.S.C. § 1257 because the Texas Supreme Court has not "passed upon" the federal claim raised in the trial court, and because Petitioner has impermissibly "switched" theories. (Opp. Br. at 2-3) Respondent's argument is without merit.

Under Section 1257(a), this Court has jurisdiction to review state court decisions where a federal question has been both raised and decided in the courts below. See *McGoldrick v. Compagnie Generale*, 309

U.S. 430, 435-36 (1940); *Illinois v. Gates*, 462 U.S. 213 (1983).

In *Illinois v. Gates*, this Court commented as follows:

> [W]e have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below. In *Dewey v. Des Moines*, 173 U.S. 193, 197-198, 19 S.Ct. 379, 380-381, 43 L.Ed 665 (1899), . . . the Court said that "if the question [in this Court] were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."

Id. at 219 (emphasis added).

Applying *Gates*, it is clear that the ERISA preemption defense has been both "raised" and "passed upon" below. Prudential has consistently raised this defense in the Texas trial court, Fourteenth Court of Appeals and Texas Supreme Court, and both the state trial court and intermediate appellate court expressly rejected this defense.[3]

Respondent's real argument is not that ERISA preemption was not raised and passed upon below, but that Petitioner has somehow waived its rights by advancing alternative theories to support the legal conclusion that ERISA preempts Respondent's state law claims. However, under *Gates*, it is plainly permissible for Petitioner to advance such alternative arguments here.

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3. See Petition at 9-14.

III.

ALL EVIDENCE ADDUCED IN THE TRIAL COURT MAY BE CONSIDERED IN ASSESSING THE ERISA PREEMPTION DEFENSE

Respondent argues that Petitioner impermissibly relies upon evidence which was introduced at the trial on the merits, subsequent to the preliminary ERISA preemption trial. However, Respondent neglects to mention that, at the completion of the preliminary ERISA preemption trial, the trial court ordered that Petitioner's ERISA motion be carried forward through the subsequent jury trial and that the trial court make fact-findings on ERISA at the conclusion of all the evidence produced at the subsequent trial.[4]

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4. E.P. Tr. 120-29.

The trial court did not render a final judgment on all matters, including ERISA preemption, until April 3, 1989, and did not enter its own findings of fact and conclusions of law on ERISA preemption until May 2, 1989. Thus, all of the evidence introduced both at the preliminary ERISA preemption trial and the subsequent trial on the merits was considered by the trial court in rejecting the ERISA preemption defense, and properly may be considered by this Court.

IV.

THE STATE COURTS BELOW CLEARLY ERRED IN FAILING TO SUSTAIN PETITIONER'S ERISA PREEMPTION DEFENSE

Respondent does not dispute that he was a participant in a welfare benefit "plan, fund or program" as that phrase is defined under ERISA, with ascertainable

(1) benefits, (2) beneficiaries, (3) financing and (4) procedures for receiving benefits. See *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc). Rather, Respondent challenges whether either Sonny's or the IGA was an "employer" for the purposes of ERISA, such that the welfare benefit plan established by the IGA and subscribed to by Sonny's would constitute an "employee welfare benefit plan" governed by ERISA. Clearly, both these entities meet the definitional requirements of an "employer" under ERISA and, thus, Respondent was claiming benefits under an ERISA-covered "employee welfare benefit plan" under either theory as to who was the statutory "employer."

A. Sonny's Is An "Employer" For The Purposes of ERISA

Respondent contends that Sonny's is not an "employer" under ERISA because it allegedly is not engaged in interstate commerce. (Opp. Br. at 25-26) Under ERISA, a welfare benefit plan affects interstate commerce if it is established and maintained "by an employer engaged in commerce or in any industry or activity affecting commerce."[5] 29 U.S.C. § 1003(a).

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5. In defining this phrase, ERISA provides:

> The term 'industry or activity affecting commerce' means any business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry 'affecting commerce' within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

29 U.S.C. § 1002(12). The term "activity affecting commerce" is an "expression of Congress' intent to regulate within the full sweep of its constitutional authority" and as such, the phrase is given an expansive interpretation. See *Winterrowd v. David Freeman and Co., Inc.*, 724 F.2d 823, 825 (9th Cir. 1984).

Sonny's is an independent automotive repair shop engaged in the business of servicing automotive vehicles. One would be hard pressed to identify any industry in America that more directly affects the means by which the bulk of interstate commerce is carried out today. Without question, this industry satisfies the ERISA definition of "interstate commerce."

Additionally, Respondent asserts that the welfare benefit plan provided by Sonny's is exempt from ERISA coverage under administrative regulation, 29 C.F.R. § 2510.3-1(j). See *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1452 (5th Cir. 1991). However, this regulatory exemption is not applicable because one of the requirements is not satisfied: Respondent's health care benefits were provided and paid for in their entirety by

Sonny's as an employee benefit. (Richey Depo. pp. 81, 82; S.F. Tr. 668)

B. The IGA Is An "Employer" For The Purposes of ERISA

Respondent also argues that the IGA is not a statutory "employer" under Section 3(5) of ERISA, which includes a cognizable "group or association of employers." (Opp. Br. at 19-25) Respondent cites several decisions which he asserts rejected ERISA preemption claims with respect to association-sponsored employee welfare benefit plans. (Opp. Br. at 19-20) The cases cited, however, do not hold that trade associations, such as the IGA, cannot constitute an "employer" for the purpose of ERISA.[6] Respondent has failed to show why

6. See, e.g., *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1452 (5th Cir. 1991) (case remanded for further fact finding since record (continued...)

the IGA, as a bona fide trade association of employers engaged in the automotive repair business, would not constitute a cognizable "group or association of employers" for the purpose of ERISA.[7]

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6. (...continued)
was inadequate to determine whether an employer had established an employee welfare benefit plan); *Matthew 25 Ministries v. Corcoran*, 771 F.2d 21, 22 (2d Cir. 1985) (plan sponsor held to be no more than an "unlicensed insurance operation," rather than a bonafide employer association); *Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) (multi-employer trust was not controlled by an employer association, but was a "proprietary enterprise, established and operated by individual businessmen for their personal profit"); *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 699 (7th Cir. 1977) (individual employer had no knowledge of, or intent to participate in plan sponsored by any employer association); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (all parties agreed that the multi-employer trust was not itself an employee welfare benefit plan; trust was not established by an employer association).

7. Respondent further argues that the IGA Trust is not governed by ERISA because it is "over inclusive" and encompasses ineligible participants. (Opp. Br. at 20-23) This simply is not true. Article I of the Declaration of Trust identifies the intended class of beneficiaries of the Insurance Trust as being "employees of employers and members of families of employees" (Pet. App. J-2; Richey Ex. 2, (continued...)

Respondent next argues (without record citation) that the IGA Trust was controlled by the insurance carrier, Prudential, rather than the IGA members. (Opp. Br. at 23-25) The DOL has recognized that a trade "association" exercises direct and/or indirect control over a trust plan if "[t]he association . . . is given the authority to amend or terminate the Trust and to replace the Trustees." Dep't of Labor Op. Ltr. 84-23A (May 23, 1984) (emphasis added). The Board of Trustees of the IGA Trust, composed of IGA member employers, had control over the Trust by its power to remove

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7. (...continued)
p. 1); and, the Group Policy issued by Prudential further limited the class of beneficiaries to IGA member employees (and their respective family members) "engaged in the repair and servicing of automobiles." (See Richey Ex. 13, p. 3) See *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240 (5th Cir. 1990) (court looked to "group policy" to determine, inter alia, the class of beneficiaries). See also *Holcomb v. Pilot Life Ins. Co.*, 754 F. Supp. 524, 527 (S.D. Miss. 1990).

trustees, to appoint successor trustees, to terminate the Trust and to contract with an insurance carrier. (Richey Dep. pp. 31, 32, 78; Richey Ex. 2, pp. 4-5) Thus, the IGA clearly controlled the essential operations of the IGA Trust. Prudential certainly possessed no control with respect to these essential functions.

Finally, Respondent argues that Sonny's failure to "formally adopt" the IGA Trust agreement defeats the existence of a multi-employer trust. (Opp. Br. at 25) Respondent urges that such "formal adoption" is required by 29 C.F.R. § 2510-37(b)(i)(A) and *Wayne Chemical Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977). Neither the cited regulations nor the cited decision imposes any such technical requirement. Rather, these authorities require knowledge of and intent

to adopt the trust agreement, and Sonny's actions here certainly establish such knowledge and intent. Quite simply, Respondent received benefits which could only be provided by virtue of Sonny's adoption of the trust agreement.

C. If This Court Rules That ERISA Preempts Respondent's State Law Claims, The Judgment Must Be Reversed

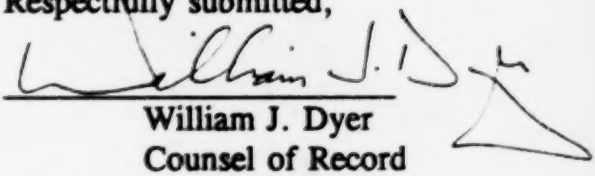
Respondent boldly asserts that even if Petitioner established its preemption defense, this would not affect the judgment. This assertion is plainly specious. Under ERISA, Respondent would not be entitled to a jury trial, *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980), and Respondent would not be entitled to the $500,000 in punitive damages awarded below. *Sommers Drug Stores Co. Employee Profit*

Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1463 (5th Cir. 1986). Moreover, the factual issues and legal standards would be different. See, e.g., *Bruch v. Firestone Tire and Rubber Co.*, __ U.S. __, 109 S.Ct. 948 (1989); *Board of Trustees of Cedar Rapids Pediatric Clinic, P.A., Pension Plan v. Continental Assurance Co.*, 690 F. Supp. 792, 795-96 (W.D. Ark. 1988).

Conclusion

Petitioner prays that this Court grant the petition in order to resolve the conflict among the state and federal courts on the sole issue presented.

Respectfully submitted,



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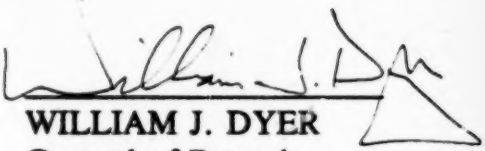
CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 1991, three (3) copies of the Petitioners' Reply Brief to Brief in Opposition were served by first class mail, postage prepaid, to Millard A. Johnson, 4500 First Interstate Bank, 1000 Louisiana, Houston, Texas 77002-5012, (713) 224-5771. All parties required to be served have been served. I am a member of the Bar of this Court.



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